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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of BellSouth Corporation,	)	**CC Docket No. U-22252**
BellSouth Telecommunications, Inc., and	)	97-231
BellSouth Long Distance, Inc. for	)	
Provision of In-Region, InterLATA	)	
Services in Louisiana	)	

To: The Commission

BRIEF AND COMMENTS IN OPPOSITION TO THE APPLICATION OF BELLSOUTH FOR PROVISION OF IN-REGION, INTERLATA SERVICES IN LOUISIANA

Submitted on Behalf of

THE INDEPENDENT PAYPHONE SERVICE PROVIDERS FOR CONSUMER CHOICE - THE "IPSPCC"

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EXECUTIVE SUMMARY

In its *Ameritech Order*,[1] the Commission established unequivocal standards to be met by a Regional Bell Operating Company ("RBOC") applying to gain authorization to provide in-region long distance telecommunications services, pursuant to Section 271 of the Telecommunications Act of 1996 ("'96 Act"). One such standard was that of the public interest. In the context of the instant application by BellSouth to gain entry into the long distance market in Louisiana, the public interest issue of greatest concern to the Independent Payphone Service Providers for Consumer Choice ("IPSPCC"), and the public interest issue which should be of the greatest concern to the Commission, is BellSouth's demonstrated violations of and continued intent to violate the laws of fair competition.

IPSPCC members, carriers, distributors and employees and agents of these companies have been subjected to the most brazen and arrogant forms of anticompetitive conduct in the territories of BellSouth. Commencing this past Spring, BellSouth undertook to eliminate competitive payphone providers from the market for competitive payphone services in BellSouth's in-region territory, including Louisiana.

In addition to its anticompetitive conduct against IPSPCC members and others, BellSouth's anticompetitive behavior has, is and will deprive end users (location providers or premises providers) of their choice of long distance carrier to service their payphone locations and their choice of using an independent payphone service provider like those which comprise the IPSPCC. To effectuate

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[1] *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket 97-137, FCC 97-298 (rel. Aug. 19, 1997) ("*Ameritech Order*").

BellSouth's anticompetitive goals, BellSouth has entered into, and will continue to enter into, contracts in restraint of trade in violation of Section 1 of the Sherman Antitrust Act.[2]

In furtherance of its anticompetitive goals, BellSouth has also engaged in direct and deliberate violation of its Comparatively Efficient Interconnection Plan, filed with the Commission as a necessary pre-condition to its right to enter the competitive pay phone market under Section 276;[3] and in violation of its duties under Section 271 of the '96 Act by having entered into in-region long distance without first obtaining Commission authorization to do so.

Given this demonstrated anti-competitive conduct and the "nose-thumbing" arrogance with which BellSouth has undertaken and perpetrated this conduct, it is clear that BellSouth cannot meet the public interest standard demanded by the '96 Act, and the Commission's qualifying policies, nor can it meet the threshold of demonstrating that it will not engage in anti-competitive conduct in the long distance market once allowed into the market. The premises considered, BellSouth's application should be denied.[4]

Since the IPSPCC filed on October 20, 1997 against BellSouth's application to enter the interexchange market in South Carolina, precedents were discovered which add substantial weight to the IPSPCC's case against allowing such entry. Decisions by the regulatory commissions in

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[2] 15 U.S.C. § 1.

[3] 47 U.S.C. § 276.

[4] IPSPCC filed an opposition to BellSouth's application to enter the long distance market in South Carolina. See, *Brief and Comments in Opposition to the Application of BellSouth for Provision of In-region, InterLATA Services in South Carolina,* CC Docket No. 97-208 (October 20, 1997).

Illinois and Michigan, establish strong analogous precedents that the conduct of BellSouth and its payphone subsidiary, BSPC, complained of by the IPSPCC here and in regard to the application for South Carolina, is anticompetitive, unreasonable and unlawful.

The Reply Brief in the South Carolina application proceeding, on behalf of BellSouth and BSPC, and the accompanying affidavit of a BSPC's representative, Melvin Shinholster, Tab 6 to the Appendix of BellSouth's South Carolina Reply Brief, addressed the assertions of the IPSPCC's opposition to that earlier application. Rather than rebut the concerns of the IPSPCC, however, the Reply Brief and Shinholster affidavit contain admissions against interest, rest on self-serving and boot-strap reasoning, and substitute hubris and bluster in place of credible evidence in defense of the companies' practices.

The BellSouth Reply Brief in the South Carolina proceeding and the Shinholster affidavit demonstrate that BellSouth lacks the type of concrete proof and factual basis required by the *Ameritech Order* to overcome the serious public interest objections to a grant of either that application or the one here for Louisiana. By its own submissions, BellSouth has shown that it is engaged in blatant market-clearing conduct in the competitive payphone arena. By distorting any reasonable reading of the intent of Section 276, BellSouth is attempting through its newly-formed payphone subsidiary, to leverage its control of its former regulated monopoly payphones into a deregulated monopoly of payphone operations in its operating territories. These unlawful actions reveal BellSouth's undaunted efforts to embrace competition in name only, while doing everything in its power to control any market segment into which it is allowed. The powerful message that should be unmistakenly clear here, is that to permit BellSouth entry into any competitive market will

only result in the lessening and then elimination of competition in that market segment. Given the recognized ability and the consistent practice of the RBOCs to "game" the system of competitive entry to their singular advantage, and to the detriment of the public, the application for Louisiana must be denied.

STATEMENT OF FACTS

The Independent Payphone Service Providers for Consumer Choice ("IPSPCC") is a non-profit organization formed by entities and individuals engaged in the competitive provision of payphone services to the public. Each of its members serve or are involved in serving thousands of payphones around the country, including thousands in the BellSouth territories, including Louisiana.

BellSouth Telecommunications, Inc. ("BellSouth") is the parent corporation and sole owner of BBS Holdings, Inc. which, in turn, is the corporate parent and sole owner of BellSouth Public Communications, Inc. ("BSPCI"). BSPCI is, therefore, an affiliate of BellSouth as defined by 47 U.S.C. §153(l).

BSPCI has entered into contract and/or business arrangements in which TelTrust Communications Services ("TelTrust") has agreed that TelTrust is to serve as the sole interexchange carrier for all interexchange telecommunications services originated at payphones over which BellSouth and its subsidiaries, including BSPCI, have control in the BellSouth operating territories -- Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

TelTrust is a non-affiliated (with BellSouth and/or BSPCI) interstate and international interexchange carrier, operator services provider (for both presubscribed and non-presubscribed (AOS) users) and also operates a PIC change verification service for other interexchange carriers.

While the financial remuneration between BellSouth/BSPCI and TelTrust is not publicly available at this time, it is certain that BellSouth/BSPCI is, and will, remunerate TelTrust for the interexchange services provided to the payphones located in BellSouth territories, including

Louisiana. It is further certain that such remuneration, whatever formula is used for its determination, results directly and solely from the agreement between the parties for the present and on-going provisioning of in-region interexchange services to the public.

According to allegations and supporting documentation filed with the Commission in a complaint proceeding,[5] in July, 1996, BSPCI began marketing to premises owners where BSPCI payphones are located to select "BellSouth's preferred carrier" for long distance services. Correspondence sent by BSPCI in conjunction with this marketing campaign thanks the customer for choosing BSPCI, forwards a copy of an agreement authorizing BSPCI to arrange interexchange long distance payphone service on behalf of the location owners, and assures premises owners that "[y]ou'll be all set when the rules for the new telecommunications legislation take effect." A copy of this correspondence is appended hereto as Exhibit A. Significantly, the Agreement for Service Negotiation Rights names "BellSouth Telecommunications, Inc." as the premises owner's "exclusive agent for all matters relating to pay telephone service, including, but not limited to, the selection of the primary interexchange carrier ("PIC") for all pay telephones covered under this Agreement." *Id.*

On March 14, 1997, BSPCI issued more marketing materials. In these marketing materials, BSPCI states clearly that when BellSouth Business Payphone Service starts on April 1, 1997, "there will be no change in the long distance carrier." It further states that "[w]hen we receive FCC approval to be able to contract and negotiate for long distance service on your behalf, we will contact

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[5] *Operator Communications, Inc. v. BellSouth Telecommunications, Inc.*, FCC File No. E-97-30, May 30, 1997.

you to obtain your authorization to use our preferred carriers. In the meantime, if you already have a contract with another carrier, please call us." A copy of this correspondence is attached hereto as Exhibit B.

Other marketing materials state: "BellSouth Business Payphone Service was developed to give customers like you single-source management of local and long distance service using BellSouth-preferred carriers . . . We will be contacting you soon for authorization to begin the selection of long distance at your BellSouth payphone location. Your choice of the total BellSouth payphone service package featuring a BellSouth-preferred carrier enable us to continue your BellSouth Business Payphone Service at the same rate. Or, you may pick a different long distance provider at ***an additional $15 per month charge.***" A copy is attached hereto as Exhibit C (emphasis added).

In combination, these marketing materials suggest that customers are required by law to reevaluate their long distance service provider and that BellSouth is the entity controlling the provision of local and long distance services to the subscriber. Moreover, these marketing materials set up charges for choosing a long distance carrier other than the "BellSouth-preferred carrier," for example, charging premises owners a fee of $15.00 per phone per month if they utilize any interexchange carrier other than the "BellSouth-preferred carrier." The marketing materials never mention the "BellSouth-preferred carrier" by name, instead leaving the premises owner only with the name of BellSouth in connection with the provision of in-region interLATA services from its public payphones.

Beginning in March of 1997, around the time BellSouth's CEI plan took effect, as required to comply with the Commission's conditions for RBOC entry into the competitive payphone market under 47 U.S.C. § 276, IPSPCC members and their premises owner contacts and customers began to experience a concerted effort by BellSouth/BSPCI to convert all premises owners' interexchange carrier to TelTrust.

BellSouth/BSPCI's efforts to convert all payphones in their territories immediately took on a coercive character as reported by many IPSPCC members. For example, in addition to the $15.00 monthly charge, BellSouth/BSPCI refused to take orders from IPSPCC members for new or renewed provision of interexchange services to premises owners' payphones.

BellSouth/BSPCI interfered with such provisioning requests by refusing to take orders from IPSPCC members as it had consistently done so prior to the time of BellSouth/BSPCI entry into the competitive payphone market. For example, three-party telephonic order processing involving the IPSP, the premises owner and BellSouth as LEC provider was interrupted or denied. Indeed, although establishing a separate subsidiary (BSPCI) to enter the competitive payphone market, BellSouth did not change the offices, contact people or telephone access numbers for IPSPs to place orders. The same personnel of BellSouth, once operating as the agents of the monopoly provider of local exchange services in the provisioning process necessary for IPSPs to place their orders to provide their payphone services, now became part of the BellSouth/BSPCI "team" to advance and promote BSPCI's provision of payphone services.

BellSouth/BSPCI personnel used various tactics in their new roles. These tactics included rude behavior during the three-party telephonic ordering process directed at both IPSPs and their

existing or would-be customers; refusal to speak with IPSP representatives during such tri-party telephone calls; refusing to answer direct questions about or requests to use another interexchange carrier other than TelTrust; informing the premise owners that they would have questions or requests about their payphone service answered by other BellSouth personnel at a later date; and by placing telephone calls to premises owners without the IPSP included.

Specific examples of such incidents, set forth in statements provided by IPSPCC's members or representatives, are included in Exhibit D attached hereto. These statements were requested by IPSP organizers to obtain evidence of what actual events were occurring in the marketplace.

On July 30, 1997, the situation had grown serious enough for IPSPCC to file a letter with the Commission's Task Force on Competition. A copy of that letter is attached as Exhibit E.

In addition, BellSouth's actions denying end user premise owners the right to select their own interexchange carrier was brought to the attention of the state attorneys general for each of the states comprising BellSouth's operating territories -- Exhibit F.[6]

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[6] The reason filings were made with the State Attorneys General's offices was and is to have those offices focus on the consumer deception and misrepresentations involved in BellSouth's marketing practices, considered by the IPSPCC as a new, but equally pernicious form of "slamming." This effort with the Attorneys General's offices was prompted by the knowledge that many of those offices view slamming of consumers for long distance service as a serious problem and one that warrants its direct involvement and enforcement efforts. See, Comments of the National Association of Attorneys General, Consumer Protection Committee, Telecommunications Subcommittee, *In the Matter of Implementation of the Subscriber Carrier Selection Charge Provisions of the Telecommunications Act of 1996*, F.C.C. CC Docket No. 94-129, filed September 12, 1997, at 3.

It is IPSPCC's position that coercing end users into taking a long distance carrier against their will, and following a policy of not allowing changes to that carrier once BellSouth has executed its coercion, is without legal or policy differences and no less anti-consumer than slamming as more

On September 9, 1997, BellSouth responded to the July 30th letter of the IPSPCC -- Exhibit G. This response was not, however, served on IPSPCC. A copy of BellSouth's response was, therefore, not received until September 17, 1997, when the former head of the Task Force on Competition, upon learning that a copy of the BellSouth response had not been served or copied, arranged to have a copy faxed to counsel for the IPSPCC -- Exhibit H.

On September 25, 1997, counsel for the IPSPCC wrote to counsel for BellSouth, the same counsel that had responded to the IPSPCC's letter of July 30, 1997 -- Exhibit I. The purpose of the September 25th letter was to offer to discuss a settlement and agreement on ceasing the tactics in the marketplace which was causing concern to IPSPCC members. No response has been forthcoming from BellSouth/BSPCI to this request to negotiate the concerns of the IPSPCC about the tactics of BellSouth/BSPCI in the marketplace.

In the meantime, the complaint to the Attorney General's office of Mississippi was passed on to the Mississippi Public Service Commission -- Exhibit J.

Commissioner Bo Robinson's office sent a response which contained an analysis attempting to explain the $15.00 monthly charge imposed by BellSouth on premises owners refusing to accept

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traditionally understood. The responses of several of the Attorneys General's offices has been to hand the IPSPCC's complaint off to the state public utility commissions or to take no action. No explanation has been provided rejecting or rebutting the position of the IPSPCC that the conduct of BellSouth deprives end users of their choice to select a preferred long distance carrier. The silence of the Attorneys General's offices on this matter is both mystifying and disturbing. One is forced to consider that the reach of the state consumer protection laws is longer when small competitors are the target of enforcement, and "short-armed" when the aim is sought to be directed to powerful monopolists.

BellSouth's choice of TelTrust as the required interexchange carrier for payphones in BellSouth's territories. That response is attached as Exhibit K.

IPSPCC did a preliminary response to the analysis supplied by Mississippi Commissioner Bo Robinson's office -- Exhibit L. IPSPCC's analysis demonstrated that BellSouth's excuses for the $15.00 monthly charge did not answer the charges that it constituted an anticompetitive coercive means by which to preclude end users from exercising their right to choose another carrier.

In addition to Mississippi, the states of Florida, Louisiana and Tennessee have responded to the letters sent on behalf of the IPSPCC about BellSouth's intent and effectuation to change all payphones in its territories to TelTrust and to eliminate the right of end users to make that selection. No action, however, has yet been taken; nor any indication that any action is contemplated.

The response of the South Carolina Attorney General's office was to send the matter to its Department of Consumer Affairs -- Exhibit M. Nothing, however, has been heard from that Department.[7] Florida's Attorney General's office may be investigating but, to IPSPCC's knowledge, no other actions have been taken by Florida's Attorney General. The Louisiana Attorney General forwarded the complaint to the PUC for that state and a representative for Commissioner Jimmy Beale's office has declared that the PUC has no jurisdiction over payphones. The State of Georgia has only now responded by referring the matter to its Public Service Commission -- Exhibit N.

[7] No responses have been received from the states of Alabama, Georgia, Kentucky or North Carolina.

ARGUMENT

The behavior of BellSouth, BSPCI and TelTrust violates Sections 201, 202, 271 and 276 of the Communications Act of 1934, as amended. 47 U.S.C. §§ 201, 202, 271, 276; and Section 1 of the Sherman Act, 15 U.S.C. 1.

Section 276 grants BellSouth "equal" rights to deal with location providers in negotiating for selection of the interLATA carrier to serve BellSouth payphones. By its coercive penalizing of location providers that choose a carrier other than that selected by BellSouth, BellSouth has grossly exceeded the rights given by Section 276 and engaged in an unjust and unreasonable practice.

The Payphone Order[8] found that undue coercion of location providers with respect to their choice of interLATA carrier is unjust and unreasonable. Payphone Order at ¶ 252.

A second unjust and unreasonable practice engaged in by the Defendants involves interference with existing contracts with its location providers. Section 276(b)(3) reinforces the validity of "any existing contracts between location providers and payphone service providers . . .," and the Commission has said that "a location provider's ability to choose [an interLATA carrier] should be protected from unjust and unreasonable interference with pre-existing agreements between location providers and payphone service providers . . . or conduct which is unduly coercive of the location provider's right to choose the carrier for payphones for its premises." Payphone Order at ¶ 15.

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[8] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 4 Comm. Reg. (P&F) 938 (1996) ("Payphone Order").

Moreover, the Commission has decreed that "interference with enforceable agreements between a location provider and [a PSP] constitutes an unjust and unreasonable practice" in violation of Section 201(b) of the Communications Act and that such practices interfere with the "efficient operation of the market by restricting choices, and thereby [limiting] the benefits of competition." Payphone Order at ¶ 252.

A third unjust and unreasonable practice engaged in by BellSouth and BSPCI involves the use of deceptive marketing materials. These mailings mislead consumers by strongly suggesting that the Commission's rules require customers to reevaluate their choice of long distance phone company. In addition, they suggest that BellSouth has control over the "BellSouth-preferred carrier" and, therefore, is the party responsible for providing long distance telecommunications services.

Section 202(a) of the Communications Act prohibits any common carrier from making or giving "any undue or unreasonable preference or advantage to any particular person, class of persons, or locality or to subject any particular person, class of persons, or locality to an undue or unreasonable prejudice or disadvantage." 47 U.S.C. § 202(a).

By identifying and taking affirmative steps to promote the business of its so-called "BellSouth-preferred carrier," TelTrust, while simultaneously charging premises owners $15.00 per phone per month for selecting any other interexchange carrier, and slamming phones away from IPSPCC members to TelTrust, Defendants are unlawfully discriminating against IPSPCC members and other interexchange carriers.

The unauthorized conversion of a telephone subscriber's PIC, so-called "slamming," is a violation of the Commission's rules and orders. 47 C.F.R. §§ 64.1100, 64.1150 (1996); and is an

unreasonable practice under Section 201(a). *See Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers,* 10 FCC Rcd 9560 (1995), *recon. pending*; *Policies and Rules Concerning Changing Long Distance Carriers*, 7 FCC Rcd 1038 (1992), *recon. denied*, 8 FCC Rcd 3215 (1993); *Investigation of Access and Divestiture Related Tariffs*, 101 FCC 2d 911 (1985), *recon. denied*, 102 FCC 2d 503 (1985); *Investigation of Access and Divestiture Related Tariffs*, 101 FCC 2d 935 (1985).

The Commission's rules require that Letters of Agency identify the rate-setting carrier explicitly. *Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers,* Report and Order, 10 FCC Rcd 9560, ¶ 29 (1995). By soliciting customers to choose the "BellSouth-preferred carrier," Defendants are utilizing improper authorizations in switching payphones to TelTrust in violation of Commission rules and policies.

Further, BellSouth, with TelTrust's consent and assistance, has repeatedly changed the PIC of payphones presubscribed to IPSPCC members by location providers to TelTrust without due authorization, as described in the Exhibits, and has caused IPSPCC members damage as a result. These actions are violations of Commission rules, 47 C.F.R. §§ 64.1100, 64.1150, and Sections 201(a) and 202(b) of the Communications Act.

Further, pursuant to the Commission's policies on slamming, BellSouth and TelTrust should be subject to civil forfeitures. *See, e.g., Long Distance Services, Inc.*, Order of Forfeiture, File No. ENF-97-04 (rel. May 8, 1997); *Target Telecom, Inc.*, Notice of Apparent Liability for Forfeiture, File No. ENF-96-04 (rel. Jan. 23, 1996); *Home Owners Long Distance, Inc.*, Notice of Apparent Liability for Forfeiture, File No. ENF-95-05 (rel. Jan. 23, 1996); *Nationwide Long Distance, Inc.*,

Notice of Apparent Liability for Forfeiture, File No. ENF-96-03 (rel. Jan. 23, 1996); *AT&T Corp.*, Notice of Apparent Liability for Forfeiture, File No. ENF-96-06 (rel. Jan. 23, 1996).

The Communications Act prohibits BOCs from providing in-region interLATA services until the BOC has been authorized by the Commission pursuant to Section 271 to do so. *See* 47 U.S.C. § 271(a). The Commission has expressly held, in response to a BellSouth claim, that Section 276 does not authorize BOCs to provide in-region interLATA services from their payphones. *Payphone Order* at ¶ 244.

BellSouth has implicitly held itself out as controlling its "BellSouth-preferred carrier" and, upon information and belief, has a financial relationship with TelTrust that violates the prohibition against BOC provision of in-region interLATA service set forth in Section 271 of the Communications Act. As the Common Carrier Bureau recently found in the context of Section 275, an RBOC or its affiliate seeking to "market" an otherwise prohibited service, such as in-region interLATA services, must do so in a way that avoids the "provision of" the prohibited offering. *Southwestern Bell Telephone Company's Comparably Efficient Interconnection Plan for Security Service*, Order, CC Docket Nos. 85-229, 90-623 and 95-20 (rel. May 16, 1997). BellSouth has so involved itself in the offering of in-region interLATA services and in its financial relations with TelTrust as to be "providing" in-region interLATA services in violation of Section 271.

In the *BellSouth Order*, the Commission found of crucial importance to its findings concerning the merits of a 271 application, that the applicant, in this case BellSouth, will carry out

its requested authorization in accordance with the requirements of section 272 of the '96 Act.[9] In this context, the Commission further pointed out that section 271 (d) (3) (B) requires a finding that the BOC applicant will comply with section 272 in the future.[10] In making such determination, the Commission will look to past and present behavior of the BOC applicant as the best indicator of whether it will carry out the requested authorization in compliance with section 272. The IPSPCC submits that BellSouth's activities in the payphone marketplace as described herein, belies BellSouth's ability or commitment to comply with section 272, now or in the future.

As described herein, BellSouth's payphone activities violate express provisions of the '96 Act requirements -- section 272(g)(2) by marketing and selling interLATA services, ostensibly through its payphone subsidiary/affiliate, BSPCI, in its in-region territories before being authorized under section 271 (d);[11] section 276(a)(1), by subsidizing its payphone service directly and indirectly from its telephone exchange access operations; section 276(a)(2), by using unlawful and coercive means to select a single interexchange carrier, TelTrust, to be the PIC; section 276(a)(2), by discriminating in favor of its payphone service by processing orders only from end users who agree to take BSPCI's preferred interexchange carrier, TelTrust; and section 276(b)(1)(C), by BellSouth's violation of the structural safeguards adopted by the Commission, principally BellSouth's CEI plan for fair and equal treatment of competitive payphone providers.

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[9] *BellSouth Order* @ ¶ 346.

[10] *Id* @ ¶ 347.

[11] The Commission may take official notice that this violation has and is occurring not only in Louisiana, but in all BellSouth in-region states.

A question is also raised whether, by tying the payphones themselves to payphone services, BellSouth/BSPCI has not violated the Commission's Non-Accounting Safeguard Order that "'a BOC cannot circumvent the section 272 requirements by transferring local exchange access facilities and capabilities to an affiliate.'"[12] IPSPCC realizes that the payphones formerly owned by the BOCs, as monopoly providers of local service access, were converted into CPE by the Payphone Orders. But the Commission surely didn't intend by that action to provide BellSouth or any other RBOC with an anticompetitive weapon to distort competition in the payphone market. Yet, by tying an end user premises owner's right to avoid a monthly penalty charge of $15.00 for exercising the right to choose a carrier other than TelTrust, BellSouth/BSPCI has distorted the use of the payphone instrument into a market-clearing weapon, and not a simple operating asset.

The Commission noted also that allegations of anticompetitive conduct are relevant to its inquiry under section 271 and would be considered in the public interest analysis to the extent it arises in 271 applications.[13] Of particular relevance to this application is the following ruling made by the Commission on certain BellSouth activities:

> Mentioning only BellSouth Long Distance unless the customer affirmatively requests the names of other interexchange carriers is inconsistent on its face with our requirement that a BOC must provide the names of interexchange carriers in random order. Such a practice would allow BellSouth Long Distance to gain unfair advantage over other interexchange carriers.[14]

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[12] *Id.* @ ¶ 373.

[13] *Id.* @ ¶ 374.

[14] *Id.* @ ¶ 376.

What BellSouth/BSPCI is doing by refusing to allow an end user premises owner any voice in the selection of the interexchange carrier to serve the payphones in BellSouth's states is an equal, if not greater unfair advantage in favor of BellSouth and BSPCI. Similarly, BellSouth's related activities violate the Commission's established standards for judging 271 applications, as set forth in the *BellSouth Order* at paragraphs 377 (refusing to provide or discontinuing related services to end users who select a competing provider), and 378 (effecting a "winback" scheme based on customer information gained through the ordering process instituted by a competitor).

In further describing the scope and purpose of its public interest analysis, the Commission stated that its analysis must:

> include an assessment of the effect of BOC entry on competition in the long distance market . . . . [that s]ection 271 . . . embodies a congressional determination that . . . local telecommunications markets must first be open to competition so that the BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market.[15]

The purpose of the Payphone Order and section 276 of the '96 Act are not to provide a sham exception to the concerns of the Commission in this area. What BellSouth/BSPCI believes it has cleverly created is the use of both its old monopoly-supported and financed payphone sets and its control over the provisioning process (equal access) to create a bottleneck by which to deliberately undermine competition in the payphone services marketplace.

Compounding the violations of the Commission's policies and the spirit, as well as the letter of the '96 Act, BellSouth has pushed even further into the equally dangerous waters of Sherman Act

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[15] *Id.* @ ¶ 388.

antitrust violations. Section 1 of the Sherman Act declares "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is . . . illegal, [and] shall be deemed . . . a felony." The contract entered into by BellSouth/BSPCI and TelTrust have as its purpose the restraint of trade and commerce in the interexchange communications services provided to payphones located in BellSouth's operating states. No extenuating circumstances exist which can in any way justify such a conspiracy to restrain trade in the newly "competitive" payphone services market.

The Commission frequently declared its interest in:

> evidence that a BOC applicant has engaged in discriminatory or other anticompetitive conduct, or failed to comply with state and federal telecommunications regulations . . . [and that such] evidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations would tend to undermine our confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority.[16]

The evidence submitted herein shows that BellSouth has engaged in a pattern of conduct that involves violating the Sherman Act, the '96 Act and various Commission policies and rules. BellSouth has undertaken such conduct in order to coopt, in its favor, the small niche market for long distance services to approximately 150,000 locations in its nine-state territory. If BellSouth is prepared to perpetrate such violations for so small a market niche, there is no reasonable basis to conclude other than that BellSouth will use any means by which to stifle any form of competition in interexchange services in its markets.

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[16] *Id.* @ ¶ 397.

Since the IPSPCC filed its opposition to the South Carolina 271 application, it has discovered applicable precedent supporting its position that the tactics engaged in by BellSouth are anticompetitive and unlawful. IPSPCC refers to a series of complaints filed against Ameritech by MCI Telecommunications with state utility commissions.

First, this series of MCI complaints are based on similar anticompetitive and misleading marketing practices like those complained of here by the IPSPCC. Second, the actions on which these complaints were based have been found by state commissions and state courts to be anticompetitive and deceptive.

On the same date as the oppositions to the BellSouth South Carolina 271 Application were due, namely, October 20, 1997, MCI Telecommunications Corporation filed complaints against Ameritech before the Illinois Commerce Commission ("ICC") (Docket 97-0540); before the Michigan Public Service Commission ("MPSC") (Case No. U-11550); and before the Public Service Commission of Wisconsin ("PSCW") (no docket or case number yet assigned). The gravamen of MCI's complaint pertinent to this Opposition may be quoted most readily from MCI's complaint filed in Illinois which alleges violations of Illinois statutes (sections 13-514 and 13-515 of the Illinois Public Utility Act ("PUA"), and a commission ruling, the ICC's April 3, 1997 Order in Docket Nos. 96-0075/0084. According to MCI's complaint:

> Ameritech Illinois has been engaging in anti-competitive activities during three-way conference calls involving MCI, Ameritech Illinois and customers, which calls are to be conducted for the sole purpose of allowing customers to authorize Ameritech Illinois to change their primary interexchange carrier ("PIC") for interMSA or intraMSA services to MCI. Ameritech Illinois' unlawful behavior includes, but is not limited to, attempting to dissuade customers from changing their PIC to MCI,

> attempting to market Ameritech Illinois products and services, and using confidential customer information to do both.

MCI supports its complaint by citation to an earlier order of the ICC in which MCI, joined by AT&T, LCI International and, later, Sprint, complained of Ameritech's policy adopting a PIC protection program at the implementation of intraMSA presubscription in Illinois in 1995. As part of Ameritech's PIC protection program, Ameritech Illinois used a bill insert to enroll customers in the PIC protection program, and once enrolled, no change in an end user's carrier for interMSA, intraMSA service or basic local exchange service could be made unless written or oral authorization was received directly from the end user by Ameritech. MCI and the other IXC complainants argued that under this program, Ameritech:

> . . . would be assured the last contact with the customer, which would provide Ameritech Illinois with an unfair opportunity at retention marketing or an opportunity to dissuade customers from changing their intraMSA toll provider to a carrier other than Ameritech Illinois . . . [and] that the result would be to give the monopolist incumbent, Ameritech Illinois, an anticompetitive advantage over its competitors just when the intraMSA market was to be opened to competition in Illinois . . .

MCI then points out that the ICC found Ameritech's bill insert actions misleading, discriminatory and anticompetitive "in that it established an unfair and unreasonable barriers (sic) to IXCs' ability to compete in the intraMSA market in Illinois in violation of Sections 9-241 and 13-505.2 of the PUA, 22 ILCS 5/9-241 and 5/13-505.2, Order, p.10."

With respect to the three-way calling procedure, the ICC found it to be anticompetitive retention marketing -- "During telephone calls for the purpose of changing the customer's intraLATA PIC to another carrier, Respondent [Ameritech Illinois] should not attempt to retain the

customer's account during the process." MCI further points out that the Illinois courts have sustained the ICC's decision. Agreeing with the ICC, the Illinois Appellate Court, First Judicial District held that "the timing of Ameritech's bill insert and offer of PIC protection hindered the opening of the intraMSA market to competition and presented an additional hurdle to customer choice." *Illinois Bell Telephone Company v. Illinois Commerce Commission, et al.*, Nos. 1-96-2146, 1-96-2166, Consolidated, September 5, 1997, slip opinion at 17.

What is evident here is that ILECs cannot lawfully manage a customer's carrier selection process. What should also be evident is that BellSouth's intended restriction of payphone location users' choice of interexchange carrier to BellSouth's preferred carrier is equally unlawful and should be quickly adjudged so here, as was Ameritech's PIC protection program and for the same reasons.

Of equally serious concern, the FCC and the Department of Justice should recognize that BellSouth's payphone practices raise serious concerns that they involve patent violations of Section 1 of the Sherman Act which outlaws contracts in restraint of trade. As the Commission must evaluate and act on future applications of BellSouth to enter the long distance market under Section 271 of the Telecommunications Act of 1996, it is incumbent on the Commission to take into consideration BellSouth's anticompetitive behavior as demonstrated here in evaluating any attempt to enter the interexchange market in Louisiana.

Underlying BellSouth's hubris, in defense of its payphone marketing practices, is a brazen propaganda campaign. BellSouth would have the Commission believe that Congress intended that the RBOCs enter the payphone market for the first time since Divestiture by driving smaller competitors from the marketplace by denying end users the right to select their long distance carrier.

The IPSPCC is not denying that BOCs may now compete for location providers and, as part of that competition, may offer long distance service from an interexchange carrier of their choosing. But a competitive offer that is intended and presented as non-optional, as an absolute necessity, is neither an offer, nor competitive.

The fact that BellSouth will not accept other PICs, even when the premises owner expressly and explicitly indicates a preference, is, based on actual experience, untrue. Numerous examples of BellSouth's truculence are provided, in exhibits attached hereto, of BellSouth's consistent practice of frustrating attempts by premises owners to select their own preferred PIC.

BellSouth's claims demonstrate its intent to distort the intention of Congress in enacting section 276 of the Act and the FCC in attempting to implement that section based on nonstructural safeguards equal to those resulting from the FCC's Computer III decisions. BellSouth claims rely, in part, on the self-serving fiction that its wholly-owned payphone subsidiary is the actual customer and that the premises owner is no longer authorized to make PIC selections. This fanciful theory can then be combined with the equally novel theory that since BellSouth's payphone subsidiary is not a common carrier, it is not subject to the nonstructural safeguards that BellSouth as a LEC is.

BellSouth's reasoning is self-serving and irrational. It rests on the premise that Section 276 was intended to change the status of end users (premises owners), as the members of the public entitled to receive competitive payphone services, into non-entities wherever BellSouth-owned payphones are located. If this were true, rather than opening payphone services to additional competition by allowing the RBOCs into the market through a subsidiary, Congress intended rather